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IN THE

Supreme Court of the United States

October Term, 1954

No. 1

OLIVER BROWN, ET AL., *Appellants,*

vs.

BOARD OF EDUCATION OF TOPEKA, ET AL., *Appellees.*

No. 2

HARRY BRIGGS, JR., ET AL., *Appellants,*

vs.

R. W. ELLIOTT, ET AL., *Appellees.*

No. 3

DOROTHY E. DAVIS, ET AL., *Appellants,*

vs.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL., *Appellees.*

No. 5

FRANCIS B. GEBHART, ET AL., *Petitioners,*

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ETHEL LOUISE BELTON, ET AL., *Respondents.*

APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF KANSAS, THE EASTERN DISTRICT OF SOUTH CAROLINA AND THE EASTERN DISTRICT OF VIRGINIA, AND ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE, RESPECTIVELY

BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 3 AND FOR RESPONDENTS IN NO. 5 ON FURTHER REARGUMENT

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BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 3 AND FOR RESPONDENTS IN NO. 5 ON FURTHER REARGUMENT

Preliminary Statement

On May 17, 1954, this Court disposed of the basic constitutional question presented in these cases by deciding that racial segregation in public education is unconstitutional. The Court said, however, that the formulation of decrees was made difficult "because these are class actions, because of the wide applicability of this decision and because of the great variety of local conditions . . . ." The cases were restored to the docket, and the parties were requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument last Term.

Questions Involved

Questions 4 and 5, left undecided and now the subject of discussion in this brief, follow:

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

   (*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

   (*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which question 4(*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(*b*),

   (*a*) should this Court formulate detailed decrees in these cases;

(*b*) if so, what specific issues should the decrees reach;

(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

Developments in These Cases Since the Last Argument

The Kansas Case

On September 3, 1953, the Topeka School Board adopted the following resolution:

> Be it resolved that it is the policy of the Topeka Board of Education to terminate the maintenance of segregation in the elementary schools as rapidly as is practicable.

On September 8, 1953, appellees ordered segregation terminated in two of the nineteen school districts in Topeka. In September, 1954, segregation was completely terminated in ten other school districts and partially in two.

There is now a total school enrollment of approximately 8,500 children of elementary school age attending 23 elementary schools. Of the 8,500 children enrolled, approximately 700 Negro children are in four elementary schools for Negroes. There are 123 Negro children now attending schools on a non-segregated basis pursuant to appellees' implementation of its policy of removing segregation from the public school system. The blunt truth is that

85% of the Negro children in Topeka's elementary schools are still being denied the constitutional rights for which appellants sought redress in their original action.

While Topeka has been effectuating its plan, several other cities of the first class have undertaken the abolition of segregated schools. Lawrence and Pittsburg have completely desegregated. Kansas City, Abilene, Leavenworth and Parsons have ordered partial desegregation. Wichita and Salina have revised their school regulations to permit Negro children to attend schools nearest their homes. Only Coffeeville and Fort Scott have not taken any affirmative action whatsoever.

The Delaware Case

By order of the Court of Chancery, affirmed by the Supreme Court of Delaware, the named plaintiffs were immediately admitted to the schools to which they applied. These plaintiffs and other members of the class are in their third year of uninterrupted attendance in the two Delaware schools named in the order. That attendance has been marked by no untoward incident. The order, however, did not result in elimination of separate schools for Negroes in the two school districts involved, in each of which one segregated elementary school is yet maintained by petitioners.

The State Board of Education has statutory authority to "exercise general control and supervision over the public schools of the State, including . . . the determination of the educational policies of the State and the seeking in every way to direct and develop public sentiment in support of public education." Delaware Code, Title 14, Section 121 (1953). Accordingly, the State Board of Education, on June 11, 1954, adopted a statement of "Policies Regarding Desegregation of Schools of the State" and announced "a general policy" that it "intends to carry

out the mandates of the United States Supreme Court decision as expeditiously as possible." It further requested that "the school authorities together with interested citizen groups throughout the State should take immediate steps to hold discussions for the purpose of (1) formulating plans for desegregation in their respective districts and (2) presenting said plans to the State Board of Education for review."

On August 19, 1954, the State Board of Education requested "that *all schools*, maintaining four or more teachers, present a *tentative plan* for desegregation in their area on or before *October 1, 1954*."

The desegregation plans of the Claymont Board of Education, whose members are petitioners here, providing for the complete termination of segregation, were approved by the State Board of Education on August 26, 1954. These plans have been partially put into operation.

No plan ending segregation in the Hockessin schools, the other Delaware area in the litigation here, has yet been formulated.

Delaware statutes provide for two types of public school districts, exclusive of the public school system in Wilmington which is practically autonomous. One type is commonly known as the State Board District. As to it, the statute provides that the "Board of School Trustees shall be the representative in the District of the State Board of Education." DELAWARE CODE, Title 14, Section 702 (1953). There are 98 such units. The other type is the Special School District, concerning which the statute provides that "There shall be a Board of Education which shall be responsible for the general administration and supervision of the free public schools and educational interests of the District." DELAWARE CODE, Title 14, Section 902 (1953). There are fifteen Special School Districts.

Desegregation in the school districts of Delaware is illustrated by the table below:

STATE BOARD DISTRICTS

	Partial Desegregation	*Complete Desegregation*	*No Desegregation*	*Total*
New Castle County ..	4	1	26	31
Kent County	0	0	24	24
Sussex County	0	0	43	43
				98

SPECIAL SCHOOL DISTRICTS

	Partial Desegregation	*Complete Desegregation*	*No Desegregation*	*Total*
New Castle County ..	3	1	1	5
Kent County	1	0	3	4
Sussex County*	0	0	6	6
				15

Wilmington, which is in New Castle County and contains 34% of the population of the State, in June desegregated all elementary and secondary schools for the 1954 summer session. It has also completely desegregated its night school sessions. Beginning in September, 1954, desegregation of all elementary schools was effectuated, with some integration of teachers.

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* Partial desegregation, that is, on the high school level, was instituted by the Milford Board of Education, in Sussex County. This action was later revoked and a test of the revocation is now pending in the Delaware courts. See Simmons v. Steiner, 108 A. 2d 173 (Del. Ct. Chanc. 1954). In that case the Vice-Chancellor found the Negro plaintiffs' rights to remain as students in Milford High School "clear and convincing" and restrained the Board of Education from excluding them. However, the Supreme Court of Delaware temporarily stayed the injunction to give that court sufficient time to examine "serious questions of law." Argument has been scheduled for December 13, 1954. Steiner v. Simmons (Del. Sup. Ct. No. 27, 1954).

The school districts involved in this litigation also are in New Castle County, which has 68% of the State's population. Desegregation in varying degrees has started in every major school district in this county, except one.

The State Board of Education has made specific requests to 58 of the 113 school districts in the State to submit such plans. Another six districts have stated that any kind of plan they may have would be more or less nullified by overcrowded classroom conditions. Fourteen others have indicated that they desire to await the mandate of this Court. The remaining districts have not responded to the State Board.

In summary, school districts in areas comprising more than 50% of the population of Delaware have undertaken some desegregation of the public schools. Many school districts in semi-urban and rural areas have undertaken no step. The ultimate responsibility for effectuating desegregation throughout Delaware rests with petitioners here, members of the State Board of Education.

The South Carolina Case

Since May 17, 1954, South Carolina's fifteen-man legislative "Segregation Study Committee" was reorganized and has conferred with the Governor, State education officials, other legislators and spokesmen from various civic and teacher organizations. All of their meetings have been closed to the public. The Committee also visited Louisiana and Mississippi "to observe what was being done in those states to preserve segregated schools."

On July 28, the committee issued an interim report which recommended that public schools be operated during the coming year "in keeping with previously established policy." The committee construed its assignment as being the formulation of courses of action whereby the State could continue public education "without unfortunate disruption by outside forces and influences which have no

knowledge of recent progress and no understanding of the problems of the present and future. . . ." Moreover, the report stated that the committee also recognized "the need for a system in keeping with public opinion and established traditions and living patterns."

The State Attorney General insisted that this Court should not undertake to direct further action even by the school district involved and announced that he considered the Clarendon County case "purely a local matter as far as the parties to the suit are concerned."

In Rock Hill (population 25,000 with 20% Negroes) a Catholic grade school voluntarily desegregated. Opening day enrollment was 29 white students and five Negroes. There has been no report of overt action against this development; but the parents of some of the children have been remonstrated with by neighbors and workers.[1]

A newspaper report [1a] of a public speech of E. B. McCord, one of the appellees herein, superintendent of education for Clarendon County, states in part:

> There will be no mixed schools in Clarendon County as long as there is any possible way for present leadership to prevent them.
>
> So declared L. B. McCord of Manning, Clarendon County superintendent of education, in an address before the Lions Club here Monday night.
>
> Decrying the fact that "Our churches seem to be letting their zeal run away in leading the way," he denounced de-segregation as contrary to the Scriptures and to good sense.

The Virginia Case

On May 27, 1954, the State Board of Education advised city and county school boards to continue segregation during the present school year.

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[1] Southern School News, Sept. 3, 1954, p. 12, col. 3-4.

[1a] Charleston News and Courier, August 4, 1954.

On August 28, the Governor named a thirty-two-man, all-white legislative commission to study the problems raised by the Court's ruling and to prepare a report and recommendations to the legislature and to him. The Governor then announced:

> . . . I am inviting the commission to ascertain, through public hearings and such other means as appear appropriate, the wishes of the people of Virginia; to give careful study to plans or legislation or both, that should be considered for adoption in Virginia after the final decree of the Court is entered, and to offer such other recommendations as it may deem proper as a result of the decision of the Supreme Court affecting the public schools.[2]

At its first meeting the commission adopted a rule that:

> All meetings of the commission shall be executive and its deliberations confidential, except when the meeting consists of a public hearing or it is otherwise expressly decided by the commission.[3]

By October, the local school boards or boards of supervisors of approximately 25 of the state's 98 counties had adopted and forwarded to the Governor resolutions urging the continuation of segregated schools.

In May, 1954, the Richmond Diocese of the Roman Catholic Church, which includes all but 6 of Virginia's counties, announced that during the Fall of 1954, Negroes would for the first time be admitted to previously all-white Catholic parochial schools where there was no separate parochial school for Negroes. Approximately 40 Negro pupils of a total of 3,527 are enrolled in four high and six

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[2] Southern School News, Sept. 3, 1954, p. 13, col. 5.

[3] Southern School News, Oct. 1, 1954, p. 14, col. 2-3.

elementary parochial schools formerly attended only by white pupils. The Superintendent of the Richmond Diocese states that integration in these schools "has worked out magnificiently, without a ripple of discontent, ..."[4]

ARGUMENT

I.

Answering Question 4: Only a Decree Requiring Desegregation as Quickly as Prerequisite Administrative and Mechanical Procedures Can Be Completed Will Discharge Judicial Responsibility for the Vindication of the Constitutional Rights of Which Appellants Are Being Deprived.

In the normal course of judicial procedure, this Court's decision that racial segregation in public education is unconstitutional would be effectuated by decrees forthwith enjoining the continuation of that segregation. Indeed, in *Sipuel* v. *Board of Regents*, 332 U. S. 631, when effort was made to secure postponement of the enforcement of similar rights, this Court not only refused to delay action but accelerated the granting of relief by ordering its mandate to issue forthwith.

In practical effect, such disposition of this litigation would require immediate initiation of the administrative procedures prerequisite to desegregation, to be followed by the admission of the complaining children and others similarly situated to unsegregated schools at the beginning of the next academic term. This means that appellees will have had from May 17, 1954, to September, 1955, to complete whatever adjustments may be necessary.

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[4] *Id.* at p. 14, col. 5.

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If appellees desire any postponement of relief beyond that date, the affirmative burden must be on them to state explicitly what they propose and to establish that the requested postponement has judicially cognizable advantages greater than those inherent in the prompt vindication of appellants' adjudicated constitutional rights. Moreover, when appellees seek to postpone the enjoyment of rights which are personal and present, *Sweatt* v. *Painter*, 339 U. S. 629; *Sipuel* v. *Board of Regents*, 332 U. S. 631, that burden is particularly heavy. When the rights of school children are involved the burden is even greater. Each day relief is postponed is to the appellants * a day of serious and irreparable injury; for this Court has announced that segregation of Negroes in the public schools "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . ." And, time is of the essence because the period of public school attendance is short.

A. Aggrieved Parties Showing Denial of Constitutional Rights in Analogous Situations Have Received Immediate Relief Despite Arguments For Delay More Persuasive Than Any Available Here.

Where a substantial constitutional right would be impaired by delay, this Court has refused to postpone injunctive relief even in the face of the gravest of public considerations suggested as justification therefor. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, this Court upheld the issuance of preliminary injunctions restraining the Government's continued possession of steel mills seized under Presidential order intended to avoid a work stoppage that would imperil the national defense during the Korean conflict. The Government argued that even though the seizure might be unconstitutional, the

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* As used in this Brief, "appellants" include the respondents in No. 5.

public interest in uninterrupted production of essential war materials was superior to the owners' rights to the immediate return of their properties. It is significant that in the seven opinions filed no Justice saw any merit in this position. If equity could not appropriately exercise its broad discretion to withhold the immediate grant of relief in the *Youngstown* case, such a postponement must certainly be inappropriate in these cases where no comparable overriding consideration can be suggested.

Similarly in Ex parte *Endo*, 323 U. S. 283, this Court rejected the Government's argument that hardship and disorder resulting from racial prejudice could justify delay in releasing the petitioner. There, the argument made by the Government to justify other than immediate relief was summarized in the Court's opinion as follows (pp. 296-297):

> It is argued that such a planned and orderly relocation was essential to the success of the evacuation program; that but for such supervision there might have been a dangerously disorderly migration of unwanted people to unprepared communities; that unsupervised evacuation might have resulted in hardship and disorder; that the success of the evacuation program was thought to require the knowledge that the Federal government was maintaining control over the evacuated population except as the release of individuals could be effected consistently with their own peace and well-being and that of the nation; that although community hostility towards the evacuees has diminished, it has not disappeared and the continuing control of the Authority over the relocation process is essential to the success of the evacuation program. It is argued that supervised relocation, as the chosen method of terminating the evacuation, is the final step in the entire process and is a consequence of the first step taken. It is conceded that appellant's detention pending compliance with the leave regulations is not directly connected with the prevention of espionage and sabotage at the present time. But it is argued that Executive Order No. 9102 confers power to make regulations

> necessary and proper for controlling situations created by the exercise of the powers expressly conferred for protection against espionage and sabotage. The leave regulations are said to fall within that category.

In a unanimous decision, with the Court's opinion by Mr. Justice Douglas and two concurring opinions, the Court held that the petitioner must be given her unconditional liberty because the detention was not permissible by either statutory or administrative authorization. Viewing the petitioner's right as being in that "sensitive area of rights specifically guaranteed by the Constitution" (p. 299), the Court rejected the Government's contention that a continuation of its unlawful course of conduct was necessary to avoid the harmful consequences which otherwise would follow.

It is true that in the *Endo* case the contention rejected was that an executive order (which on its face did not authorize the petitioner's detention) ought to be extended by "construction" so as to entitle the Relocation Authority to delay the release of the petitioner until it felt that social conditions made it convenient and prudent to do so. In this case, the suggestion is that this Court, in the exercise of its equity powers, ought to withhold appellants' constitutional rights on closely similar grounds. But this is not a decisive distinction. If, as the *Endo* case held, the enjoyment of a constitutional right may not be deferred by a process of forced construction on the basis of factors closely similar to the ones at work in the instant case, then certainly this Court ought not to find in its equitable discretion a mandate or empowerment to obtain the same result.

In the *Endo* case, the national interest in time of war was present. In these cases, no such interest exists. Thus, there is even less basis for delaying the immediate enjoyment of appellants' rights.

Counsel have discovered no case wherein this Court has found a violation of a present constitutional right but has postponed relief on the representation by governmental officials that local mores and customs justify delay which might produce a more orderly transition.

It would be paradoxical indeed if, in the instant cases, it were decided for the first time that constitutional rights may be postponed because of anticipation of difficulties arising out of local feelings. These cases are brought to vindicate rights which, as a matter of common knowledge and legal experience, need, above all others, protection against local attitudes and patterns of behavior.[5] They are brought, specifically, to uphold rights under the Fourteenth Amendment which are not to be qualified, substantively or remedially, by reference to local mores. On the contrary, the Fourteenth Amendment, on its face and as a matter of history, was designed for the very purpose of affording protection against local mores and customs, and Congress has implemented that design by providing redress against aggression under color of state laws, customs and usages. 28 U. S. C. § 1343; 42 U. S. C. § 1983.

Surely, appellants' rights are not to be enforced at a pace geared down to the very customs which the Fourteenth Amendment and implementing federal laws were designed to combat.

Cases in which delays in enforcement of rights have been granted involve totally dissimilar considerations. Such cases generally deal with the abatement of nuisances, e.g., *New Jersey* v. *New York*, 283 U. S. 473; *Wisconsin* v. *Illinois*, 278 U. S. 367; *Arizona Copper Co.* v. *Gillespie*, 230 U. S. 46; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230; or with violations of the anti-trust laws, e.g., *Schine*

[5] In the instant cases, dark and uncertain prophecies as to anticipated community reactions to school desegregation are speculative at best.

Chain Theaters v. *United States*, 334 U. S. 110; *United States* v. *National Lead Co.*, 332 U. S. 319; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1.

These cases are readily distinguishable, and are not precedents for the postponement of relief here. In the nuisance cases, the Court allowed the offending parties time to comply because the granting of immediate relief would have caused great injury to the public or to the defendants with comparatively slight benefit to the plaintiffs. In the instant cases, a continuation of the unconstitutional practice is as injurious to the welfare of our government as it is to the individual appellants.

In the anti-trust cases, delay could be granted without violence to individual rights simply because there were no individual rights on the plaintiff's side. The suits were brought by the Government and the only interest which could have been prejudiced by the delays granted is the diffuse public interest in free competition. The delays granted in anti-trust cases rarely, if ever, permit the continuance of active wrongful conduct, but merely give time for dissolution and dissipation of the effects of past misconduct. Obviously, these cases have nothing to do with ours.

It should be remembered that the rights involved in these cases are not only of importance to appellants and the class they represent, but are among the most important in our society. As this Court said on May 17th:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our

> recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Neither the nuisance cases nor the anti-trust cases afford any support for delay in these cases. On the contrary, in cases more nearly analogous to the instant cases, this Court has held that the executive branch of the government could not justify the detention of wrongfully seized private property on the basis of a national economic crisis in the midst of the Korean conflict. Nor could the War Relocation Authority wrongfully detain a loyal American because of racial tension or threats of disorder. It follows that in these cases this Court should apply similar limitations to the judiciary in the exercise of its equity power when a request is made that it delay enjoyment of personal rights on grounds of alleged expediency.

B. Empirical Data Negate Unsupported Speculations That a Gradual Decree Would Bring About a More Effective Adjustment.

Obviously, we are not aware of what appellees will advance on further argument as reasons for postponing the enforcement of the rights here involved. Therefore, the only way we can discuss Question 4(b) is by conjecture in so far as reasons for postponement are concerned.

There is no basis for the assumption that gradual as opposed to immediate desegregation is the better, smoother or more "effective" mode of transition. On the contrary, there is an impressive body of evidence which supports the position that gradualism, far from facilitating the process, may actually make it more difficult; that, in fact, the problems of transition will be a good deal less complicated than might be forecast by appellees. Our submission is that this, like many wrongs, can be easiest and best undone, not by "tapering off" but by forthright action.

There is now substantial documented experience with desegregation in this country, in schools and elsewhere.[6] On the basis of this experience, it is possible to estimate with some accuracy the chances of various types of "gradual" plans for success in minimizing trouble during the period of transition.

Some plans have been tried involving a set "deadline" without the specification of intervening steps to be taken. Where such plans have been tried, the tendency seems to have been to regard the deadline as the time when action is to be initiated rather than the time at which desegregation is to be accomplished. Since there exists no body of knowledge that is even helpful in selecting an optimum time at the end of which the situation may be expected to be better, the deadline date is necessarily arbitrary and hence may be needlessly remote.[7]

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[6] See ASHMORE, THE NEGRO AND THE SCHOOLS (1954); CLARK, DESEGREGATION: AN APPRAISAL OF THE EVIDENCE, 9 J. SOCIAL ISSUES 1-77 (1953); NEXT STEPS IN RACIAL DESEGREGATION IN EDUCATION, 23 J. NEGRO ED. 201-399 (1954).

See also REPORT BY THE PRESIDENT'S COMMITTEE ON EQUALITY OF OPPORTUNITY IN THE ARMED FORCES (1950).

[7] ASHMORE, *op. cit. supra* note 6, at 70, 71, 79, 80; CLARK, *op. cit. supra* note 6, at 36, 45.

A species of the "deadline" type of plan attempts to prepare the public, through churches, radio and other agencies, for the impending change. It is altogether conjectural how successful such attempts might be in actually effecting change in attitude. The underlying assumption—that change in attitude must precede change in action—is itself at best a highly questionable one. There is a considerable body of evidence to indicate that attitude may itself be influenced by situation [8] and that, where the situation demands that an individual act as if he were not prejudiced, he will so act, despite the continuance, at least temporarily, of the prejudice.[9] We submit that this Court can itself contribute to an effective and decisive change in attitude by insistence that the present unlawful situation be changed forthwith.

As to any sort of "deadline" plan, even assuming that community leaders make every effort to build community support for desegregation, experience shows that other forces in the community will use the time allowed to firm

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[8] CLARK, *op. cit. supra* note 6, at 69-76.

[9] KUTNER, WILKINS and YARROW, VERBAL ATTITUDES AND OVERT BEHAVIOR INVOLVING RACIAL PREJUDICE, 47 J. ABNORMAL AND SOCIAL PSYCH. 649-652 (1952); LA PIERE, ATTITUDES VS. ACTION, 13 SOCIAL FORCES 230-237 (1934); SAENGER and GILBERT, CUSTOMER REACTIONS TO THE INTEGRATION OF NEGRO SALES PERSONNEL, 4 INT. J. OPINION AND ATTITUDES RESEARCH 57-76 (1950); DEUTSCH and COLLINS, INTERRACIAL HOUSING, A PSYCHOLOGICAL STUDY OF A SOCIAL EXPERIMENT (1951); CHEIN, DEUTSCH, HYMAN and JAHODA, CONSISTENCY AND INCONSISTENCY IN INTERGROUP RELATIONS, 5 J. SOCIAL ISSUES 1-63 (1949).

up and build opposition.[10] At least in South Carolina and Virginia, as well as in some other states affected by this decision, statements and action of governmental officials since May 17th demonstrate that they will not use the time allowed to build up community support for desegregation.[11] Church groups and others in the South who are seeking to win community acceptance for the Court's May

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[9] (cont.) ASHMORE, *op. cit. supra* note 6, at 42; New York Times, "Mixed Schools Set in 'Border' States", August 29, 1954, p. 88, col. 1-4; New York Times, "New Mexico Town Quietly Ends Pupil Segregation Despite a Cleric", August 31, 1954, p. 1, col. 3-4; ROSE, YOU CAN'T LEGISLATE AGAINST PREJUDICE—OR CAN YOU?, 9 COMMON GROUND 61-67 (1949), reprinted in RACE PREJUDICE AND DISCRIMINATION, (Rose ed. 1951); NICHOLS, BREAKTHROUGH ON THE COLOR FRONT (1954); MERTON, WEST and JAHODA, SOCIAL FICTIONS AND SOCIAL FACTS: THE DYNAMICS OF RACE RELATIONS IN HILLTOWN, COLUMBIA UNIVERSITY BUREAU OF APPLIED SOCIAL RESEARCH (mimeographed); MERTON, WEST, JAHODA and SELDEN, SOCIAL POLICY AND SOCIAL RESEARCH IN HOUSING, 7 J. SOCIAL ISSUES, 132-140 (1951); MERTON, THE SOCIAL PSYCHOLOGY OF HOUSING (1948).

South as well as North, people's actions and attitudes were changed not in advance of but after the admission of Negroes into organized baseball. See CLEMENT, RACIAL INTEGRATION IN THE FIELD OF SPORTS, 23 J. NEGRO ED. 226-228 (1954). Objections to desegregation have generally been found to be greater before than after its accomplishment. CLARK, *op. cit. supra* note 6, *passim*; CONFERENCE REPORT, ARIZONA COUNCIL FOR CIVIC UNITY CONFERENCE ON SCHOOL SEGREGATION (Phoenix, Arizona, June 2, 1951).

[10] CLARK, *op. cit. supra* note 6, at 43, 44; BROGAN, THE EMERSON SCHOOL—COMMUNITY PROBLEM, GARY, INDIANA, BUREAU OF INTERCULTURAL EDUCATION REPORT (October 1947, mimeographed); TIPTON, COMMUNITY IN CRISIS 15-76 (1953).

[11] For the latest example of this, see New York Times, "7 of South's Governors Warn of 'Dissensions' in Curb on Bias—Avow Right of States to Control Public School Procedures—Six at Meeting Refrain from Signing Statement", November 14, 1954, p. 58, col. 4-5.

17th decision cannot be effective without the support of a forthwith decree from this Court.

Besides the "deadline" plans, various "piecemeal" schemes have been suggested and tried. These seem to be inspired by the assumption that it is always easier and better to do something slowly and a little at a time than to do it all at once. As might be expected, it has appeared that the resistance of some people affected by such schemes is increased since they feel arbitrarily selected as experimental animals. Other members in the community observe this reaction and in turn their anxieties are sharpened.[12]

Piecemeal desegregation of schools, on a class-by-class basis, tends to arouse feelings of the same kind [13] and these feelings are heightened by the intra-familial and intra-school differences thus created.[14] It would be hard to imagine any means better calculated to increase tension in regard to desegregation than to so arrange matters so that some children in a family were attending segregated and others unsegregated classes. Hardly more promising of harmony is the prospect of a school which is segregated in the upper parts and mixed in the lower.

When one looks at various "gradual" processes, the fact is that there is no convincing evidence which supports the theory that "gradual" desegregation is more "effec-

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[12] TIPTON, *op. cit. supra* note 11, at 42, 47, 57, 71; CLARK, SOME PRINCIPLES RELATED TO THE PROBLEM OF DESEGREGATION, 23 J. NEGRO ED. 343 (1954); CULVER, RACIAL DESEGREGATION IN EDUCATION IN INDIANA, 23 J. NEGRO ED. 300 (1954).

[13] ASHMORE, *op. cit. supra* note 6, at 79, 80; CLARK, DESEGREGATION: AN APPRAISAL OF THE EVIDENCE, *op. cit. supra* note 6, at 36, 45.

[14] CLARK, EFFECTS OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENTS, MID-CENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH (mimeographed, 1950).

tive".[15] On the contrary, there is considerable evidence that the forthright way is a most effective way.[16]

The progress of desegregation in the Topeka schools is an example of gradualism based upon conjecture, fears and speculation regarding community opposition which might delay completion of desegregation forever. The desegregation plan adopted by the Topeka school authorities called for school desegregation first in the better residential areas of the city and desegregation followed in those areas where the smallest number of Negro children lived. There is little excuse for the school board's not having already completed desegregation. Apparently either the fact that the school board, in order to complete the transition, may have to utilize one or more of the former schools for Negroes and

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[15] ASHMORE, *op. cit. supra* note 6, at 80:

> Proponents of the gradual approach argue that it minimizes public resistance to integration. But some school officials who have experienced it believe the reverse is true. A markedly gradual program, they contend, particularly one which involves the continued maintenance of some separate schools, invites opposition and allows time for it to be organized. Whatever the merit of this argument, the case histories clearly indicate a tendency for local political pressure to be applied by both sides when the question of integration is raised, and when policies remain unsettled for a protracted period the pressures mount. One school board member in Arizona privately expressed the wish that the state had gone all the way and made integration mandatory instead of optional—thus giving the board something to point to as justification for its action.

[16] CLARK, *op. cit. supra* note 6, at 46, 47; WRIGHT, RACIAL INTEGRATION IN THE PUBLIC SCHOOLS OF NEW JERSEY, 23 J. NEGRO ED. 283 (1954); KNOX, RACIAL INTEGRATION IN THE SCHOOLS OF ARIZONA, NEW MEXICO, AND KANSAS, 23 J. NEGRO ED. 291, 293 (1954); CULVER, RACIAL DESEGREGATION IN EDUCATION IN INDIANA, 23 J. NEGRO ED. 296, 300-302 (1954).

assign white children to them or the fact that it must now reassign some 700 Negro children to approximately seven former all-white schools, seems to present difficulties to appellees. One must remember that in Topeka there has been complete integration above the sixth grade for many years. The schools already desegregated have reported no difficulties. There can hardly be any basic resistance to nonsegregated schools in the habits or customs of the city's populace. The elimination of the remnants of segregation throughout the city's school system should be a simple matter.

No special public preparations involving teachers, parents, students or the general public were made, nor were they necessary in advance of either the first or second step in the implementation of the Board's decision to desegregate the school system. Indeed, the Board of Education adopted the second step in January, 1954, and the only reports of what was involved were those published in the newspapers. Negro parents living in these territories were not notified by appellees regarding the change, but transferred their children to the schools in question on the basis of information provided in the newspapers. As far as the teachers in those schools were concerned, they were merely informed in the Spring of 1954 that their particular schools would be integrated in September. Thus, delay here cannot be based upon need for public orientation.

It should be pointed out that of the 23 public elementary schools, there exists potential space for some additional 83 classrooms of which 16 such potential classrooms are in the four schools to which the majority of the Negroes are now assigned. No claim can be made that the school system is overcrowded and unable to absorb the Negro and white children under a reorganization plan. There is no discernable reason why all of the elementary schools of Topeka have not been desegregated.

As is pointed out in the Brief for Petitioners on Further Reargument in *Bolling* v. *Sharpe* (No. 4, October

Term, 1954) the gradualist approach adopted by the Board of Education in Washington, D. C., produced confusion, hardship and unnecessary delay. Indeed, the operation of the "Corning Plan" has produced manifold problems in school administration which could have been avoided if the transition had been immediate. The argument that delay is more sound educationally has been shown to be without basis in fact in the operation of the District of Columbia plan—so conclusively, in fact, that the time schedule has been accelerated. The experience in the District argues for immediate action.

To suggest that this Court may properly mold its relief so as to serve whatever theories as to educational policy may be in vogue is to confuse its function with that of a school board, and to confuse the clear-cut constitutional issue in these cases with the situation in which a school board might find itself if it were unbound by constitutional requirements and were addressing itself to the policy problem of effecting desegregation in what seems to it the most desirable way. But even if a judgment as to the abstract desirability of gradualism could be supported by evidence, it is outside the province of this Court to balance the merely desirable against the adjudicated constitutional rights of appellants. The Constitution has prescribed the educational policy applicable to the issue tendered in this case, and this Court has no power, under the guise of a "gradual" decree, to select another.

We submit that there are various necessary administrative factors which would make "immediate" relief as of tomorrow physically impossible. These include such factors as need for redistricting and the redistribution of teachers and pupils. Under the circumstances of this case, the Court's mandate will probably come down in the middle or near the close of the 1954 school term, and the decrees of the courts of first instance could not be put into effect until September, 1955. Appellees would, therefore, have had from May 17, 1954, to September, 1955, to make necessary administrative changes.

II.

Answering Question 5: If This Court Should Decide to Permit an "Effective Gradual Adjustment" from Segregated School Systems to Systems Not Based on Color Distinctions, It Should Not Formulate Detailed Decrees but Should Remand These Cases to the Courts of First Instance with Specific Directions to Complete Desegregation by a Day Certain.

In answering Question 5, we are required to assume that this Court "will exercise its equity powers to permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions" thereby refusing to hold that appellants were entitled to decrees providing that, "within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice." While we feel most strongly that this Court will not subordinate appellants' constitutional rights to immediate relief to any plan for an "effective gradual adjustment," we must nevertheless assume the contrary for the purpose of answering Question 5.[17]

Question 5 assumes that there should be an "effective gradual adjustment" to a system of desegregated educa-

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[17] "5. On the assumption on which question 4(*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

tion. We have certain difficulties with this formulation. We have already demonstrated that there is no reason to believe that any form of gradualism will be more effective than forthwith compliance. If, however, this Court determines upon a gradual decree, we then urge that, as a minimum, certain safeguards must be embodied in that "gradual" decree in order to render it as nearly "effective" as any decree can be which continues the injury being suffered by these appellants as a consequence of the unconstitutional practice here complained of.

Appellants assume that "the great variety of local conditions", to which the Court referred in its May 17th opinion, embraces only such educationally relevant factors as variations in administrative organization, physical facilities, school population and pupil redistribution, and does not include such judicially non-cognizable factors as need for community preparation, Ex Parte *Endo*, 323 U. S. 283, and threats of racial hostility and violence, *Buchanan* v. *Warley*, 245 U. S. 60; *Monk* v. *City of Birmingham*, 185 F. 2d 859 (C. A. 5th 1950), *cert. denied*, 341 U. S. 940.

Further we assume that the word "effective" might be so construed that a plan contemplating desegregation after the lapse of many years could be called an "effective gradual adjustment." For, whenever the change is in fact made, it results in a desegregated system. We do not understand that this type of adjustment would be "effective" within the meaning of Question 5 nor do we undertake to answer it in this framework. Rather, we assume that under any circumstances, the question encompasses due consideration for the constitutional rights of each of these appellants and those presently in the class they represent to be free from enforced racial segregation in public education.

Ordinarily, the problem—the elimination of race as the criterion of admission to public schools—by its very nature would require only general dispositive directions by this Court. Even if the Court decides that the adjustment to

nonsegregated systems is to be gradual, no elaborate decree structure is essential at this stage of the proceedings. In neither event would appellants now ask this Court, or any other court, to direct or supervise the details of operation of the local school systems. In either event, we would seek effective provisions assuring their operation—forthwith in the one instance and eventually in the other—in conformity with the Constitution.

These considerations suggest appellants' answers to Question 5. Briefly stated, this Court should not formulate detailed decrees in these cases. It should not appoint a special master to hear evidence with a view to recommending specific terms for such decrees. It should remand these cases to the courts of first instance with directions to frame decrees incorporating certain provisions, hereinafter discussed, that appellants believe are calculated to make them as nearly effective as any gradual desegregation decree can be. The courts of first instance need only follow normal procedures in arriving at such additional provisions for such decrees as circumstances may warrant.

Declaratory Provisions

This Court should reiterate in the clearest possible language that segregation in public education is a denial of the equal protection of the laws. It should order that the decrees include a recital that constitutional and statutory provisions, and administrative and judicial pronouncements, requiring or sanctioning segregated education afford no basis for the continued maintenance of segregation in public schools.

The important legal consequence of such declaratory provisions would be to obviate the real or imagined dilemma of some school officials who contend that, pending the issuance of injunctions against the continuation of segregated education in their own systems, they are entitled or even obliged to carry out state policies the invalidity of

which this Court has already declared. The dilemma is well illustrated by the case of *Steiner* v. *Simmons* (Del. Sup. Ct. No. 27, 1954), pending in the Delaware Supreme Court, wherein plaintiffs are suing for readmission to Milford's high school from which, on September 30, 1954, they were expelled because they are Negroes. The Vice Chancellor granted the requested mandatory injunction, finding that plaintiffs had a constitutional right to readmission to school. The Delaware Supreme Court, however, granted a stay pending determination of the appeal on the basis of its preliminary conclusion that "there are serious questions of law touching the existence of that legal right." [18]

This Court's decision of May 17th put state authorities on notice that thereafter they could not with impunity

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[18] Cf. Burr v. Bd. of School Commrs. of Baltimore, Superior Court of Baltimore City, Oct. 5, 1954 (unreported), in which case Judge James K. Cullen stated in part:

> In the instant case this Court is asked to issue a writ of mandamus requiring these defendants, the School Board, to continue with its policy of segregation. This Court finds the Board of School Commissioners have exercised their discretion legally and in accordance with a final and enforceable holding and decision of the Supreme Court. Those cases were undoubtedly argued before the Supreme Court fully, and the views of every division of thought of our citizenry was undoubtedly presented to the Court; but the Court has spoken. Whether the individual agrees or disagrees with the finding, he is bound thereby so long as it remains the law of the land. The Court realizes the change and the difficulty some may have accepting the reality or the inevitable from the standpoint of enforcement. We live in a country where our rights and liberties have been protected under a system of laws which has withstood the test of time. We must allow ourselves to be governed by those laws, realizing there are many differences among our people. Respect for the law is of paramount importance. The law must be accepted. We must all be forced to abide by it. We can gain nothing by demonstrations of violence except sorrow and possible destructions.

abrogate the constitutional rights of American children not to be segregated in public schools on the basis of race. This type of recital in the decree should foreclose further misunderstanding, real or pretended, of the principle of law that continuation of racial segregation in public education is in direct violation of the Constitution—state constitutions, statutes, custom or usage requiring such segregation to the contrary notwithstanding.

Time Provisions

We do not know what considerations may be presented by appellees to warrant gradualism. But whatever these considerations may be, appellants submit that any school plan embracing gradualism must safeguard against the gradual adjustment becoming an interminable one. Therefore, appellants respectfully urge that this Court's opinion and mandate also contain specific directions that any decree to be entered by a district court shall specify (1) that the process of desegregation be commenced immediately, (2) that appellees be required to file periodic reports to the courts of first instance, and (3) an outer time limit by which desegregation must be completed.

Even cases involving gradual decrees have required some amount of immediate compliance by the party under an obligation to remedy his wrongs to the extent physically possible.[19] In *Wisconsin* v. *Illinois*, 281 U. S. 179, the Court said:

> It already has been decided that the defendants are doing a wrong to the complainants, and that they must stop it. They must find out a way at their peril. We have only to consider what is possible if the state of Illinois devotes all its powers to

[19] See Wisconsin v. Illinois, 281 U. S. 179; Arizona Copper Co. v. Gillespie, 230 U. S. 46; Georgia v. Tennessee Copper Co., 206 U. S. 230; Westinghouse Air Brake Co. v. Great Northern Ry. Co., 86 Fed. 132 (C. C. S. D. N. Y. 1898).

> dealing with an exigency to the magnitude of which it seems not yet to have fully awaked. It can base no defenses upon difficulties that it has itself created. If its Constitution stands in the way of prompt action, it must amend it or yield to an authority that is paramount to the state (p. 197).
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> 1. On and after July 1, 1930,[20] the defendants, the state of Illinois and the sanitary district of Chicago are enjoined from diverting any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago drainage canal and its auxiliary channels or otherwise in excess of an annual average of 6,500 c.f.s. in addition to domestic pumpage (p. 201).

Considering the normal time consumed before the issuance of the mandate of this Court and the time for submission and preparation of decrees by the courts of first instance, decrees in these cases will not issue until after February, 1955—after the normal mid-term in most school systems. Thus, the school boards would have until September, 1955—sixteen months after the May 17th opinions—to change to a system not based on color distinctions. This time could very well be considered as necessarily incidental to any decision by this Court requiring "forthwith" decrees by the courts of first instance.

Whatever the reasons for gradualism, there is no reason to believe that the process of transition would be more effective if further extended. Certainly, to indulge school authorities until September 1, 1956, to achieve desegregation would be generous in the extreme. Therefore, we submit that if the Court decides to grant further time, then the Court should direct that all decrees specify September, 1956, as the outside date by which desegregation must be accomplished. This would afford more than a year, in excess of the time necessary for administrative changes,

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[20] This opinion was rendered April 30, 1930.

to review and modify decisions in the light of lessons learned as these decisions are put into effect.

We submit that the decrees should contain no provision for extension of the fixed limit, whatever date may be fixed. Such a provision would be merely an invitation to procrastinate.[21]

We further urge this Court to make it plain that the time for completion of the desegregation program will not depend upon the success or failure of interim activities. The decrees in the instant cases should accordingly provide that in the event the school authorities should for any reason fail to comply with the time limitation of the decree, Negro children should then be immediately admitted to the schools to which they apply.[22]

All states requiring segregated public education were by the May 17th decision of this Court put upon notice that segregated systems of public education are unconstitutional. A decision granting appellees time for gradual adjustment should be so framed that no other state maintaining such a system is lulled into a period of inaction and induced to merely await suit on the assumption that it will then be granted the same period of time after such suit is instituted.

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[21] ASHMORE, THE NEGRO AND THE SCHOOLS 70-71 (1954); CULVER, RACIAL DESEGREGATION IN EDUCATION IN INDIANA, 23 J. NEGRO ED. 296-302 (1954).

[22] See United States v. American Tobacco Co., 221 U. S. 106, where this Court directed the allowance of a period of six months, with leave to grant an additional sixty days if necessary, for activities dissolving an illegal monopoly and recreating out of its components a new situation in harmony with the law, but further directed that if within this period a legally harmonious condition was not brought about, the lower court should give effect to the requirements of the Sherman Act.

Conclusion

Much of the opposition to forthwith desegregation does not truly rest on any theory that it is better to accomplish it gradually. In considerable part, if indeed not in the main, such opposition stems from a desire that desegregation not be undertaken at all. In consideration of the type of relief to be granted in any case, due consideration must be given to the character of the right to be protected. Appellants here seek effective protection for adjudicated constitutional rights which are personal and present. Consideration of a plea for delay in enforcement of such rights must be preceded by a showing of clear legal precedent therefor and some public necessity of a gravity never as yet demonstrated.

There are no applicable legal precedents justifying a plea for delay. As a matter of fact, relevant legal precedents preclude a valid plea for delay. And, an analysis of the non-legal materials relevant to the issue whether or not relief should be delayed in these cases shows that the process of gradual desegregation is at best no more effective than immediate desegregation.

WHEREFORE, we respectfully submit that this Court should direct the issuance of decrees in each of these cases requiring desegregation by no later than September of 1955.

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